93-943

DEC 13 1993

No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1993

In the Matter of the Application of

KENNETH A. PERKO, JR.,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules in the Nature of Prohibition, Or, in the Alternative, in the Nature of Mandamus,

-against-

THE HONORABLE WILLIAM J. DAVIS, Justice of the Supreme Court of the State of New York, County of New York,

Respondent,

and

Mary E. Lynn, Barnes & Noble, Inc., and Rockefeller Center, Inc.,

Additional Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department

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STEVEN DELIBERT
Attorney for Petitioner
277 Broadway
New York, N. Y. 10007

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QUESTION PRESENTED

May a non-party, employee deposition witness in a state court action, be sua sponte, summarily, personally sanctioned with a substantial monetary fine, for allegedly obstructive conduct at the deposition, where there has been no notice by any party or by the court that such personal sanctions were being sought or considered, and there was no opportunity for the individual so sanctioned to be heard in opposition?

IDENTITY OF PARTIES

The names of all parties to the proceeding appear in the caption hereof.

Barnes & Noble, Inc., and Rockefeller Center, Inc., whose names appear in the caption, were parties to the underlying action in Supreme Court, New York County, and therefore by operation of law were nominal parties to the Petition which commenced this Special Proceeding, but did not appear or participate at any stage of the Special Proceeding, and are not parties on this Petition for a Writ of Certiorari.

No listing of corporate parents and subsidiaries pursuant to Rule 29.1 is accordingly required.

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In the

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October Term, 1993

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-against-

THE HONORABLE WILLIAM J. DAVIS, Justice of the Supreme Court of the State of New York, County of New York,

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and

Mary E. Lynn, Barnes & Noble, Inc., and Rockefeller Center, Inc.,

Additional Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department

---

The petitioner, Kenneth A. Perko, Jr., respectfully prays that a writ of certiorari issue to review the judgment and decision of the Supreme Court of the State of New York, Appellate Division, First Department, entered

in the above-entitled proceeding on November 5, 1992.

OPINIONS BELOW

The opinion of Supreme Court, New York County, imposing sanctions on Petitioner, is unreported. It is set forth in the Appendix hereto, p. 1a, infra.

The decision of the Appellate Division, First Department, dismissing without opinion the Petition which sought review of the trial court's action, is unreported. It is set forth in the Appendix hereto, p. 7a, infra.

The decision of the Court of Appeals of the State of New York, dismissing the appeal therefrom without opinion, is reported at 81 N.Y.2d 783, 610 N.E.2d 391, 594 N.Y.S.2d 718. It is set forth in the Appendix hereto, p. 9a, infra.

The decisions of the Appellate Division, First Department, and of the Court of Appeals

of the State of New York, respectively denying leave to appeal, and denying amendment of the Court of Appeals' remittitur, all without opinion, are unreported, and are set forth in the Appendix hereto, at pp. 11a, 13a, and 16a, respectively, infra.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257, on the ground that a right claimed under the Constitution of the United States, the protection against deprivation of property without due process of law contained in the Fourteenth Amendment, is asserted in opposition to the actions of the courts below.

The claim of a deprivation of property without of due process of law was interposed by Petitioner at the first opportunity in the proceedings below, his Petition to the Appellate Division, First Department (22a, at 23a, 35a), as he had no opportunity at all to be heard in the trial court.

The Court of Appeals of the State of New York, the highest court of the state in which review could have been had hereof, denied leave to appeal by order dated September 14, 1993. (15a).

CONSTITUTIONAL PROVISION

Constitution of the United States of America, Amendment Fourteen:

Section 1. . . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

The underlying action giving rise to this proceeding seeks recovery for personal injuries. Lynn v. Barnes & Noble, Inc. and Rockefeller Center, Inc., Supreme Court, New York County Index No. 23044/90. In that action, plaintiff alleges that she was injured, due to negligent maintenance or other defect in the entranceway of a Barnes & Noble bookstore in the area of Manhattan commonly known as Rockefeller Center. (2a). Petitioner appeared as a deposition witness on behalf of his employer, defendant Rockefeller Center, Inc.; and subsequently, pursuant to subpoena, appeared also as a non-party witness. (30a).

Although Petitioner is an attorney, he did not at any time appear in the action as such, on behalf of any party; his participation was solely as a witness.

A series of deposition sessions, applications by plaintiff to compel further tes-

timony, and orders by Supreme Court (32a), culminated in a final session, at which Petitioner invoked his constitutional privilege against self-incrimination, in response to questions concerning his association with various entities apparently deemed by plaintiff to have improperly maintained the property, thus causing her injuries. (32a).

Plaintiff in the trial court thereupon moved for sanctions against Rockefeller Center, Inc., including an order striking its answer and determining liability by default. No relief was requested against Petitioner; nor was the motion served on Petitioner or on the counsel who had separately appeared for him (34a). Although aware of the existence of the pending motion, Petitioner and his counsel made an express decision, in direct reliance on the absence of any request for relief against Petitioner, that they had no occasion to respond to a motion which did not seek relief against Petitioner, which had not been

served on Petitioner, and which had been made in an action to which Petitioner was not a party. (34a).

On April 9, 1992, Respondent, Hon. William J. Davis, rendered a decision (2a), which purported to impose a substantial money sanction of $5,000.00 on Petitioner personally, without a request by any party for such relief, without notice to Petitioner that the court was contemplating any such relief, without an opportunity for Petitioner to be heard in opposition, and without a prior determination that the Fifth Amendment privilege which petitioner had invoked was frivolously, or even erroneously, interposed.

Without stating the authority upon which it relied -- whether the New York Civil Practice Law and Rules, or the relatively new New York court regulations permitting sanctions for

"frivolous" or otherwise improper conduct,[1] or a theory of inherent power over witnesses, or over attorneys even when they appear as witnesses and not as attorneys for parties -- the court purported to punish both Rockefeller Center, Inc., and Petitioner with a mixture of costs and sanctions:

> "In addition, for his actions as stated herein on behalf of his employer and as an attorney, Kenneth Perko is sanctioned the sum of $5,000.00. Defendant Rockefeller Center, Inc., is also sanctioned $5,000.00, as Perko was its chosen representative. Plaintiff's attorney shall receive thirty percent (30%) of the sanctions; the attorney for defendant Barnes & Nobel [sic], Inc., twenty percent (20%); and the Clients' Security Fund, fifty percent (50%)." (2a, at 5a).

Petitioner[2] thereupon instituted this proceeding in the Appellate Division of Supreme Court, pursuant to Article 78 of the New York Civil Practice Law and Rules, to obtain re-

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[1] Subpart 130-1 of the Rules of the Chief Administrator of the Courts of New York, 22 N.Y.C.R.R. 130-1 et. seq.

[2] A non-party to the underlying action, with accordingly doubtful standing to prosecute a direct appeal.

lief from this blatantly improper order. Respondent, by the Attorney General of New York, opposed the petition and cross-moved to dismiss, as did plaintiff Lynn, on both substantive and procedural grounds: That the sanction was properly imposed; and that if there was any defect, the proper avenue of review was by appeal and not by proceeding pursuant to Article 78.

The Appellate Division's memorandum decision and order of November 5, 1992, dismissing the petition (7a) did not state which of the foregoing grounds was relied upon for dismissal. Petitioner thereupon sought to proceed by appeal as of right to the Court of Appeals of the State of New York, which dismissed the appeal without opinion (9a), whereupon Petitioner returned to the Appellate Division for leave to appeal, also unsuccessfully. (11a). Petitioner then sought leave to appeal from the Court of Appeals, which likewise denied leave, on September 14, 1993 (13a), and de-

nied Petitioner's subsequent motion for an order amending the remittitur. (16a). This Petition has followed.

The issues presented by this Petition are thus at once as old as Magna Charta, and yet novel and increasingly important for the current jurisprudence of the State of New York and of the nation generally, in light of the emerging prominence of sanction provisions kindred to New York's Subpart 130-1: May a non-party, deposition witness be sua sponte subjected to substantial, personal money sanctions, for allegedly obstructive conduct at a deposition, without notice to him, without request by any party for sanctions against him, and without opportunity for him to be heard in opposition or in explanation of his conduct? Can such a manifest breach of the most elemental requirement of due process, be brushed aside by talismanic invocation of the courts' "inherent powers", or their "supervisory authority", or any other such ritual formula?

It is important to emphasize that Petitioner does not seek here, and did not seek at any appellate level in New York, any review of the substance of the determinations by the trial court concerning Petitioner's conduct, or to impose sanctions; what was and is challenged by Petitioner, is the procedure adopted by the court, of summarily imposing such sanctions sua sponte, without notice or hearing of any kind.

None of the courts below chose to render an opinion on any of the important issues presented by this matter, on any of the occasions when the case was before them -- on Petitioner's original Article 78 proceeding in the Appellate Division, or on his attempt to appeal as of right to the Court of Appeals, or on his motions for leave to appeal to that Court -- and that silence leaves no guidance for litigants, for non-party witnesses, for their counsel, or for the lower courts, in this area of increasing importance to the or-

derly administration of justice in the State of New York and in state courts throughout the country.

The procedures by which that rule's provisions are to be invoked, it is submitted, are no less important than its substance, and the facts of this case make plain that the constitutional implications of those procedures must be elucidated for the state courts. This case provides an appropriate vehicle for that elucidation, and the Court should take the opportunity thus presented, to insure the constitutionally proper application of this new and increasingly important provision, and like provisions in the jurisprudence of numerous other states.

REASONS FOR GRANTING THE WRIT

SANCTIONS MAY NOT BE IMPOSED WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD.

The decision of Justice Davis announcing the summary, sua sponte imposition of sanctions on Petitioner Perko is silent as to whether it purports to rely on statute, on rule, or on some theory of "inherent authority" over attorneys, but whatever the basis therefor, it is plainly contrary to elemental constitutional requirements of due process, which encompass the right to notice and hearing.

POINT I.

This Court Has Uniformly Required Adherence to Standards of Due Process in All Forms of Sanction Proceedings.

If there are fixed stars of constitutional analysis, one of those unfailing beacons surely, is that no person may be deprived of property without notice and opportunity to be heard. "There are certain immutable principles of justice which inhere in the very idea of free government which no member of the

Union may disregard, as that no [one] shall be condemned in . . . person or property without due notice and an opportunity of being heard in . . . defence." Holden v. Hardy, 169 U.S. 366, 389-390, 18 S.Ct. 383, 42 L.Ed. 780 (1898); accord, Powell v. Alabama, 287 U.S. 45, 68, 53 S.Ct. 55, 77 L.Ed. 158 (1932). The principle inheres in the very concept of due process. Blackmer v. United States, 284 U.S. 421, 438, 52 S.Ct. 252, 76 L.Ed. 375 (1932).

Throughout this century, this Court has unhesitatingly recognized that whatever the rubric under which courts may have acted against attorneys or others appearing before them; and whatever the kind or degree of alleged misconduct which might be laid at the feet of an offending party, attorney, or witness, there is an absolute and irreducible minimum of indispensable due process which must be accorded even to lawyers, before a court may unleash its wrath on attorneys or others, however miscreant.

These principles have been applied in cases involving counsel fees awarded under the courts' "inherent powers", Roadway Express, Inc. v. Piper, 447 U.S. 752, 767, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980); disbarment, In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); lesser punishments imposed through traditional attorney-discipline mechanisms, Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) (reprimand); and contempt, at least outside the presence of the court, Bloom v. Illinois, 391 U.S. 194, 204, 88 S.Ct. 1477, 1483, 20 L.Ed.2d 522 (1968); Cooke v. United States, 267 U.S. 517, 537, 45 S.Ct. 390, 395, 69 L.Ed. 767 (1925). The apparent absence of any consideration by this Court of due process requirements in the context of the sanction power under F.R.Civ.P. Rule 11, would appear to be a function solely of the virtual unanimity of Circuit Court decisions on the subject,

see, e.g., Securities Indus. Ass'n v. Clarke, 898 F.2d 318 (2d Cir. 1990); Jones v. Pittsburgh Nat'l Corp., 899 F.2d 1350 (3d Cir. 1990); Spiller v. Ella Cinders Geriatric Center, 919 F.2d 339 (5th Cir. 1990); and numerous other cases collected at 2A Moore, Federal Practice ¶11.02[4.-1], and n. 5. (but see, Mike Ousley Prods., Inc. v. WJBF-TV, 952 F.2d 380 (11th Cir. 1991)).

Thus, even conceding, as this Court invariably has, that "The traditional and primary responsibility of state courts for establishing and enforcing standards for members of their bars and the quasicriminal nature of bar disciplinary proceedings . . . call for exceptional deference by the federal courts," Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 438, 102 S.Ct. 2515, 2524, 73 L.Ed.2d 116 (1982) (Brennan, J., concurring in the judgment), it is plain that principles of due process must apply here as in any governmental proceeding which seeks to

deprive a citizen of liberty or property.

As shown by Piper, Zauderer, Ruffalo, Cooke, and the numerous Circuit Court decisions regarding due process under F.R.Civ.P. Rule 11, as there have arisen, in turn, various rubrics under which courts have sought to vindicate their undeniable interests in the orderly administration of justice and the control of the parties and the proceedings before them, Link v. Wabash R.R. Co., 370 U.S. 626, 630-31, 82 S.Ct. 1386, 1388-89, 8 L.Ed.2d 734, 738 (1962), it has been necessary for this Court or the lower federal courts at intervals throughout the Twentieth Century, to take up and examine in turn each sub-species of theory of sanction or discipline, and to insure that in each, some minimal standard of due process is recognized by the courts applying the sanctions.

Indeed, many state courts have recognized that even where they may purport to invoke

their "summary" power to deal with attorneys as officers of the court, there is nevertheless an irreducible minimum of due process, contemplating at the least notice and a hearing, which must be accorded before sanctions may be imposed.

POINT II.

The Growing Importance of Nontraditional Sanctions in State Court Jurisprudence Requires Explication of the Applicable Standards of Due Process of Law.

The courts of many states have explicitly recognized that the requirements of due process -- including particularly, notice and opportunity to be heard -- are applicable to such newer and less traditional forms of sanction as fines and awards of attorney's fees for misconduct in a particular action, and the requirements of due process have been held applicable whether the court purported to act under court rule, see, e.g. Brady v. Fireman's Fund Ins. Cos., 484 A.2d 566 (D.C. App. 1984) (closely analogous facts: violation of due

process to subject attorney to fee award, under local analogue of F.R.Civ.P. Rule 37, where motion for such award did not specify award sought against attorney; cured when attorney had opportunity to be heard (unlike here) upon motion for relief under Rule 60); Roos v. La Prade, 444 A.2d 950 (D.C. App. 1982); Weidner v. Superior Court, Third Judicial Dist., 715 P.2d 264 (Alaska App. 1986) (reliance on court rule requiring notice); O'Brien v. Cseh, 148 Cal.App.3d 957, 196 Cal. Rptr. 409 (2d Dist. 1983); or under some theory of "inherent power" over attorneys, Van Eps v. Johnston, 150 Vt. 324, 553 A.2d 1089 (1988).

Even the New York courts have so recognized in other contexts. Matter of Long, 287 N.Y. 449, 455, 40 N.E.2d 246, 249-250 (1942) (attorneys accused of overreaching and wrongly obtaining fees from an incompetent client entitled to be heard); Matter of Eldridge, 82 N.Y. 161, 167, 168, 37 Am.Rep. 558 (1880) (ac-

cusation of professional misconduct, allegedly committed outside the presence of the court: ". . . [T]he accused . . . is entitled to confront the witnesses, to subject them to cross examination, and to invoke the protection of wise and settled rules of evidence. In adopting this conclusion we only secure to the members of the bar the common rights and ordinary privileges of the citizen."

Here, by contrast, Petitioner was denied not only an opportunity to be heard, but even notice that sanctions against him were sought or contemplated; and he and his attorney explicitly relied on that lack of notice, in determining that they had no occasion to oppose a motion which sought no relief against him, in an action where he was not a party. (34a). Indeed, the procedural trap laid for Petitioner here -- imposing sanctions on him personally, after he and his counsel had determined not to respond to the motion in reliance on the understanding that it sought sanc-

tions only against his employer -- is not unlike the very trap found offensive in Ruffalo, of amending the charges to include the precise subjects of his testimony, after he had completed his defense against the other charges. 390 U.S. 544, at 552, 88 S.Ct. 1222, at 1226.

The emerging importance of sanction cases in state court litigation is nowhere more manifest than in the very multiplicity of recent cases wherein the New York Court of Appeals has undertaken to apply New York's relatively new sanction rule, Subpart 130-1 of the Rules of the Chief Administrator of the New York Courts, and explain its substantive reach. In just three years, that busy court has had over a half-dozen occasions to apply or explicate the Rule. See, Parks v. Leahey & Johnson, P.C., 81 N.Y.2d 161, 613 N.E.2d 153, 597 N.Y.S.2d 278 (1993); Guarnier v. American Dredging Co., 79 N.Y.2d 846, 580 N.E.2d 92, 580 N.Y.S.2d 194 (1992); Jason v. Chusid, 78 N.Y.2d 1099, 586 N.E.2d 50, 578 N.Y.S.2d 867

(1991); Intercontinental Credit Corp. v. Roth, 78 N.Y.2d 306, 579 N.E.2d 688, 574 N.Y.S.2d 528 (1991); Maroulis v. 64th Street-Third Avenue Associates, 77 N.Y.2d 831, 567 N.E.2d 978, 566 N.Y.S.2d 584 (1991); Bell v. New York Higher Education Assistance Corp., 76 N.Y.2d 930, 564 N.E.2d 664, 563 N.Y.S.2d 54 (1990); Ministers, Elders, and Deacons of the Reformed Protestant Church of the City of New York v. 198 Broadway, Inc., 76 N.Y.2d 411, 559 N.E.2d 429, 559 N.Y.S.2d 886 (1990).

Only in the latter case did the court acknowledge even inferentially the issues of due process instinct in the imposition of sanctions: In a footnote, the court observed that "[p]etitioner's express request for . . . sanctions . . . furnished respondent with adequate notice . . . . " Id., 76 N.Y.2d at 413, 559 N.E.2d at 430, 559 N.Y.S.2d at , note *; and even here, the court was silent as to whether its finding of "adequate" notice constituted a recognition of the due process

issues presented, or was solely intended to refer to the sanction rule's requirement of a motion on notice under the Civil Practice Law and Rules.

Otherwise, the New York Court of Appeals has made no effort to emphasize for the lower New York courts, the requirements of due process which are an essential analogue of the inherent and summary power to sanction attorneys and parties. See, Roadway Express, Inc. v. Piper, 447 U.S. 752, 764, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488, 500 (1980) (need for "restraint and discretion"); Chambers v. NASCO, Inc., 500 U.S. , , 111 S.Ct. 2123, 2136, 115 L.Ed.2d 27, 48 (1991) ("must comply with the mandates of due process.").

That continuing failure, it is submitted, gives rise to cases such as this one, and will give rise to many more, if this Court does not take the opportunity to emphasize to the states that "sanctions", no less than con-

tempt, or disbarment, or censure, may only be imposed in a manner consistent with the requirements of the Constitution which governs and protects us all.

CONCLUSION

For the reasons set forth herein, the within Petition for a Writ of Certiorari should be granted.

Dated: New York, N. Y.
December 13, 1993

Respectfully submitted,

STEVEN DELIBERT
Attorney for Petitioner
277 Broadway
New York, N. Y. 10007
(212)267-7183

Appendix

SUPREME COURT OF THE STATE OF NEW YORK
- NEW YORK COUNTY

Part

PRESENT:
Hon. WILLIAM J. DAVIS
Justice.

MARY E. LYNN

-against-

BARNES and NOBLE INC., et ano.

Index Number 23044-90
Motion Date 2-4-92
Motion Seq. No. .005
Trial Cal. No. 15

The following papers numbered 1 to _____

read on this motion to _

Notice of Motion/Order to Show Cause - Affidavits - Exhibits

Answering Affidavits - Exhibits

Replying Affidavits

Upon the foregoing papers it is ordered that this motion

Dated: April 9, 1992 /s/
J.S.C., WILLIAM J. DAVIS

SUPREME COURT : NEW YORK COUNTY
IAS : PART 3
- - - - - - - - - - - - - - - - -X

MARY E. LYNN,

Plaintiff,

-against- Index No. 23044/90

BARNES & NOBLE, INC. and
ROCKEFELLER CENTER, INC.,

- - - - - - - - - - - - - - - - -X

WILLIAM J. DAVIS, J.:

Plaintiff Mary E. Lynn ("Lynn") moves for an order to strike the answer of defendant Rockefeler Center, Inc. ("Rockefeller"), and directing the entry of judgment against said defendant on the issue of liability and other relief.

Defendant Barnes & Noble, Inc. ("B&N") cross-moves for an order for summary judgment on its crossclaim against Rockefeller.

This is an action for damages sustained by plaintiff, age 74, who allegedly tripped and fell on a broken floor in a revolving doorway at the entrance to the B&N located in the

Rockefeller Center complex.

On March 19, 1991, this Court ordered Rockefeller to comply with the preliminary conference order, including appearing for a deposition. Rockefeller appeared by its corporate secretary and attorney, Kenneth Perko ("Perko"), whose counsel directed him not to answer certain questions, although it had been stipulated that all questions must be answered, except as to privilege and form.

On July 19, 1991, this Court ordered Perko to appear for further deposition, no later than August 31, 1991, and answer all the questions which his counsel previously refused to allow him to answer. Instead of obeying the Court's order, Rockefeller refused to appear at the deposition, and at the last moment, brought a motion for summary judgment, based on Perko's aborted deposition. Rockefeller's action was so blatently improper that the Court imposed sanctions and ordered Perko to appear for examination at the Courthouse on

October 30, 1991.

On that day, Perko appeared and refused to answer any questions other than those not answered and refused to answer any questions other than those not answered at the previous deposition. This Court ruled that this was a continuation of the previously aborted examination and that this was a continuation of the previously aborted examination and that plaintiff could ask any questions of the witness which might have a bearing on this case. Perko then took the position that the questions asked sought information which he had obtained in his position as an attorney for the various Rockefeller entities and therefore were privileged. A review of these questions indicated that privilege does not attach. As to other questions, Perko asserted that he did not understand what was being asked and was constantly evasive in his answers.

Taken together with Perko's counsel's long-winded, double-talk objections, it is quite

obvious that the deposition was an exercise in futility. Therefore, this Court grants plaintiff's motion and B&N's cross-motion to the extent of precluding Rockefeller from introducing any evidence at a trial on the issues concerning any information which plaintiff should have been given at the deposition.

In addition, for his actions as stated herein on behalf of his employer and as an attorney, Kenneth Perko is sanctioned the sum of $5,000.00. Defendant Rockefeller Center, Inc., is also sanctioned $5,000.00, as Perko was its chosen representative. Plaintiff's attorney shall receive thirty percent (30%) of the sanctions; the attorney for defendant Barnes & Nobel, Inc., twenty percent (20%); and the Clients' Security Fund, fifty percent (50%).

If any party refuses to receive the monies then it shall go to the Clients' fund.

This constitutes the decision and order of this Court.

Dated: New York, New York
April 9, 1992

/s/
WILLIAM J. DAVIS, J.S.C.

Decision, Appellate Division,
First Department, November 5, 1992

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on November 5, 1992

Present - Hon. Joseph P. Sullivan
Justice Presiding
John Carro
E. Leo Milonas
Theodore R. Kupferman,
Justices.

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In the Matter of the Application of
Kenneth A. Perko, Jr.

Petitioner,

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules in the Nature of Prohibition, Or, in the Alternative, in the Nature of Mandamus,

-against-

46901
[M-3863
M-4261
M-4894]

The Honorable William J. Davis, Justice of the Supreme Court of the State of New York, County of New York,

Respondent,

Mary E. Lynn, Barnes & Noble, Inc. and Rockefeller Center, Inc.,
Additional Respondents.

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The above-named petitioner having presented

an application to this Court praying for an order, pursuant to Article 78 of the Civil Practice Law and Rules, seeking to direct respondent justice to strike the fine imposed; and for other related relief,

And cross-motions having been made by respondent and additional respondents to dismiss the petition,

And said proceeding having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied, the cross-motions granted and the petition dismissed, with costs and with disbursements.

ENTER:

_____

Decision, Court of Appeals of the State of New York, January 19, 1993

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of January A.D. 1993

PRESENT, HON. RICHARD D. SIMONS, Acting Chief Judge, presiding.

Mo. No. 40 SSD 3
In the Matter of Kenneth A. Perko, Jr.,

Appellant,

v.

The Honorable William J. Davis, Justice of the Supreme Court of the State of New York, & c.,
Respondent,
et al.,

Additional Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same

hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

DONALD M. SHERAW

Donald M. Sheraw
Clerk of the Court

Decision, Appellate Division,
First Department, May 11, 1993

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on May 11, 1993

Present -- Hon. Joseph P. Sullivan,
Justice Presiding
John Carro
E. Leo Milonas
Theodore R. Kupferman, Justices

In the Matter of the Application of
Kenneth A. Perko, Jr.,
Petitioner,
For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules in the Nature of Prohibition, or, in the Alternative, in the Nature of Mandamus,
-against- M-1059
The Honorable William J. Davis, Justice of the Supreme Court of the State of New York, County of New York,
Respondent,
Mary E. Lynn, Barnes & Noble, Inc. and Rockefeller Center, Inc.
Additional Respondents.

Petitioner having moved for leave to appeal to the Court of Appeals from the decision and order of this Court entered on November 5, 1992 (Appeal No. 46901),

And additional respondent Mary E. Lynn having cross-moved for an order dismissing the within petition and imposing sanctions upon petitioner,

Now, upon reading and filing the papers with respect to the said motion and cross-motion, and due deliberation having been had thereon,

It is ordered that the said motion be and the same is denied,

It is further ordered that said cross-motion be and the same is denied, in its entirety.

ENTER:

/s/ Francis X. Galdi
Clerk

Order, Court of Appeals of the State of New York, September 14, 1993

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth day of September 1993

PRESENT, Hon. Judith S. Kaye, Chief Judge, presiding.

Mo No. 734
In the Matter of Kenneth A. Perko, Jr.,

Appellant,

v.

The Honorable William J. Davis, Justice of the Supreme Court of the State of New York, &c.,

Respondent,

et al.,

Additional Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant

herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Judge Levine took no part.

/s/
Stuart M. Cohen
Deputy Clerk of the Court

Decision, Court of Appeals of the State of New York, September 14, 1993

State of New York
Court of Appeals

DECISION September 14, 1993

Mo. No. 734

In the Matter of Kenneth A. Perko, Jr.,

Appellant,

v.

The Honorable William J. Davis, Justice of the Supreme Court of the State of New York, &c.,

Respondent,

et al.,

Additional Respondents.

Motion for leave to appeal denied.

Judge Levine took no part.

Order, Court of Appeals of the State of New York, November 18, 1993

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighteenth day of November, 1993.

Present, HON. JUDITH S. KAYE, Chief Judge, Presiding.

Mo. No. 1186
In the Matter of Kenneth A. Perko, Jr.,
Appellant,
v.
The Honorable William J. Davis, Justice of the Supreme Court of the State of New York, &c.,
Respondent,
et al.,
Additional Respondents.

A motion to amend the remittitur, treated as a motion to amend this Court's order denying leave to appeal, in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/
Donald M. Sheraw
Clerk of the Court

Decision, Court of Appeals of the State of New York, November 18, 1993

State of New York
Court of Appeals

DECISION November 18, 1993

Mo. No. 1186
In the Matter of Kenneth A. Perko, Jr.,

Appellant,

v.

The Honorable William J. Davis, Justice of the Supreme Court of the State of New York, &c.,

Respondent,

et al.,

Additional Respondents.

Motion to amend remittitur, treated as a motion to amend this Court's order denying leave to appeal, denied.

Notice of Petition

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION -- FIRST DEPARTMENT
----------X

In the Matter of the Application of:

Index No.

KENNETH A. PERKO, JR.,

Petitioner,

NOTICE OF PETITION

For a Judgment Under Article 78 of the Civil Practice Law and Rules in the Nature of Prohibition, or, in the Alternative, in the Nature of Mandamus,

-against-

THE HONORABLE WILLIAM J. DAVIS, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK,

Respondent.

MARY E. LYNN, BARNES & NOBLE, INC. and ROCKEFELLER CENTER, INC.,

Additional Respondents.
----------X

PLEASE TKE NOTICE, that upon the annexed Petition of Kenneth A. Perko, Jr., by his attorney, William T. Livingston, III, verified the 26th day of June, 1992, and the exhibits attached thereto, and the annexed Affirmations

of Frank V. Kelly, dated June 29, 1992, and William T. Livingston, III, dated July 1, 1992, the undersigned will apply to the above Court, at a motion part thereof to be held at the Courthouse, 27 Madison Avenue, New York, New York on the 27th day of July, 1992, at 10:00 a.m., or as soon thereafter as counsel may be heard, for a judgment in the nature of prohibition to be issued by this Court to Respondent, pursuant to C.P.L. R. Article 78, Respondent from taking any further action against the Petitioner without or in excess or Respondent's jurisdiction; directing Respondent to strike the provisions imposing the $5,000.00 fine against Petitioner from his April 9, 1992 Order; and awarding Petitioner such other, further or supplemental relief as to the Court may appear just and proper.

PLEASE TAKE FURTHER NOTICE, pursuant to CPLR 403 and 2214 (b), that answering papers, if any, including any cross-motion which may be addressed to the petition, must be served not

later than seven (7) days prior to the motion date, plus five (5) days if by mail.

Dated: New York, New York
July 1, 1992

WILLIAM T. LIVINGSTON, III
Attorney for Petitioner
277 Broadway (Suite 1606)
New York, New York 10007
(212) 406-5250

To: The Honorable William J. Davis
Justice of the Supreme Court of the State of New York
County of New York
Room 242
60 Centre Street
New York, New York 10007

The Honorable Robert Abrams,
Attorney General of the State of New York
24th Floor
120 Broadway
New York, New York 10271

The Honorable Stanley Ostrau
New York Supreme Court
Administrative Judge (Civil)
Supreme Court
New York, New York 10007

And the Additional Respondents above-named

Petition

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION -- FIRST DEPARTMENT
----------X

In the Matter of the Application of:

KENNETH A. PERKO, JR.,

Index No.

Petitioner,

For a Judgment Under Article 78 of the Civil Practice Law and Rules in the Nature of Prohibition, Or, in the Alternative, in the Nature of Mandamus,

PETITION

-against-

THE HONORABLE WILLIAM J. DAVIS, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK,

Respondent.

MARY E. LYNN, BARNES & NOBLE, INC. and ROCKEFELLER CENTER, INC.,

Additional Respondents.
----------X

The Petition of KENNETH A. PERKO, Jr., Petitioner, respectfully alleges:

1. The Respondent, the Hon. WILLIAM J. DAVIS, is a Justice of the Supreme Court of

the State of New York, presiding at an I.A.S. Part 3 of the said Court, held in and for the County of New York.

2. The Petitioner is duly licensed by the State of New York as an attorney, and a real estate broker. In his professional capacities, and as a corporate officer or director, Petitioner counsels and acts for numerous corporations and other entities, in diverse business and charitable activities in New York and elsewhere.

3. This proceeding seeks to restrain the Respondent from imposing a threatened fine in the amount of $5,000.00 directly and personally on the Petitioner, without or in excess of Respondent's jurisdiction, without prior notice to Petitioner or opportunity to be heard, without just cause or coherent explanation, arbitrarily and capriciously, in violation of Petitioner's fundamental, constitutional rights to due process and privileges against self-incrimination, and in wholesale disregard

of the Judiciary Law (Art. 19, §§750 - 781), the Uniform Rules for the Trial Courts (22 NYCCR Part. 130, §§130-1.1 - 130-1.5), and/or any other color of law.

4. The threatened fine appears in the Respondent's Decision and Order dated April 9, 1992, in an action known as Lynn v. Barnes & Noble, Inc., et al., N.Y. Co. Index No. 23044/90. A copy of the complained-of Order is attached hereto as Exhibit 1. [Page 2a of this Appendix.]

5. The Petitioner is not a party (and would not be a proper party) to the Lynn action. Upon information and belief, no related action or proceeding has been commenced against him. Petitioner has no avenue to appeal, or otherwise to seek review of the unusual, unjust and irrational punishment threatened to be imposed upon him, except by resort to this extraordinary writ.

Prior Proceedings, Which Led
Up To the Conduct Complained Of.

6. Under this heading, Petitioner will out-

line certain proceedings in the court below, antecedent to the conduct complained of, so as to briefly explain the surrounding circumstances.

7. The Lynn action was filed in 1990, by plaintiff's attorneys, Gilroy, Downes, Horowitz & Brea, seeking substantial money damages on allegations that unspecified wrongful acts or omissions by defendants had caused plaintiff to fall and suffer grievous personal injuries on or near commercial real property in mid-town Manhattan. Defendants appeared and pleaded by their attorneys: Bombara & McGlynn for Barnes & Noble, and Quirk & Bakalor for Rockefeller Center, Inc. The action was assigned to the Respondent, presiding in I.A.S. Part 3.

8. On March 22, 1991, Respondent directed defendant Rockefeller Center, Inc. to provide various discovery, including its ". . . appearance for deposition on an agreed date, within 30 days of service of this order with

notice of entry." A copy of the March 22, 1991 order is attached hereto as Exhibit 2. [Omitted from this Appendix.]

9. The Petitioner, in his capacity as Secretary of Rockefeller Center, Inc., was produced as deposition witness for Rockefeller Center, Inc.'s as defendant in the Lynn action, and was subjected to many hours of exhaustive questioning by counsel for plaintiff, during four deposition sessions spanning from March 22, 1991 until November 1, 1991. Not once during his onerous examination as witness produced for a corporate party to the action, did Petitioner seek to assert any privilege against self-incrimination.

10. Respondent issued two written orders concerning Petitioner's initial deposition while it was proceeding. One such order, dated July 19, 1991, ordered,

> "Kenneth Perito" [sic] "to answer those questions propounded to him at his deposition which his attorney refused to allow him to answer. By terms of the stipulation agreed to by the parties, Perito was required to answer the questions."

Upon information and belief, based on the advice of counsel, no stipulation required answers to the objected-to questions. In effect, Respondent falsely purported the existence of such a "stipulation" so as to avoid addressing defense counsel's well-founded objections on their merits. A copy of the July 19, 1991 order is attached hereto as Exhibit 4. [Omitted from this Appendix.]

11. The second such order, dated October 10, 1992, sought to intimidate counsel for Rockefeller Center, Inc. for having, in Respondent's words, "the gall to move for relief" by way of summary judgment. Respondent denied the motion, again without any rational explanation, and continued, sua sponte,

> "In addition, this motion was made without obtaining this Court's permission. Such conduct offends the conscience of the Court and defendant's attorneys are sanctioned $5,000.00 for their conduct. The money is to be paid to the Client's Security Fund."

This Honorable Court has previously criticized Respondent for refusing to hear motions unless

prior permission had been granted, and for using such rule to intimidate dis-favored attorneys, evade dealing with the merits of the cases before him, and deprive parties of their basic rights. Hochberg v. Davis, 171 A.D.2d 192, 575 N.Y.S.2d 311 (1 Dept, October 24, 1991). The October 10, 1991 order herein, copy attached hereto as Exhibit 5 [omitted from this Appendix.], considered together with Hochberg, evidences a continuing pattern of intimidation, evasion and disrespect for fundamental rights by the Respondent.

12. In the concluding sessions of Petitioner's deposition as witness for the defendant corporation, Respondent continued to override defense objections without reason or explanation. A copy of the transcript of Respondent's rulings on October 31, 1991 is attached hereto as Exhibit 6. [Omitted from this Appendix.]

13. On November 1, 1991, Respondent again sought to intimidate defense counsel, rather

than consider their arguments, by capriciously charging,

> ". . . [T]his is an attempt by [defense] counsel to delay this proceeding, and to flagrantly violate the orders of this court, and I find that he is in violation of the orders and is fined $500.00, stay execution of until the end of this Examination Before Trial. Can we proceed to direct to have your client answer the question? You are not in contempt yet, you are just going to be fined for delaying this."

A copy of the pertinent portions of the November 1, 1991 deposition session is attached hereto as Exhibit 7. [Omitted from this Appendix.]

16. Upon information and belief, during the exhaustive, seven month deposition of Petitioner as a witness for defendant Rockefeller Center, Inc., plaintiff obtained answers to all questions which were properly asked, not requiring the disclosure of privileged information.

The Conduct Complained Of.

17. During the above-mentioned October 31, 1991 session of the Petitioner's deposition as witness for the defendant corporation, Respon-

dent, apparently sua sponte, conceived the notion that plaintiff should take Petitioner's deposition again, on the same subject matter as that first deposition, but for the second time as a non-party witness.

18. In so proceeding, Respondent's evident purpose was to use intimidation directly to compel Petitioner to make improper disclosures of privileged information, and thereby, again, to evade dealing with the merits of arguments raised by the defense:

> "THE COURT: So, then, I guess, one way to simplify matters would be for me to sign, to cut through all this, for me to sign a subpoena for the plaintiff to serve on Mr. Perko." (October 31, 1991, Exhibit 6, pp 5 - 6.) [Omitted from this Appendix.]

19. Later in the same session, Respondent encouraged plaintiff to pursue a non-party deposition of Petitioner:

> "THE COURT: Now, if you [Mr. Kelly, defense counsel] have any other serious problems about him [Petitioner] as a non-party, I suggest that you notify him that you have this problem and he can take necessary steps, starting now, to communicate with counsel of his choice on the non-party deposition, ...

"MR. KELLY: It is the Court's order that the non-party EBT go forward with the EBT that we are taking now?

"MR. GILROY [plaintiff's counsel]: I'm making that application, Your Honor, if you will?

"THE COURT: You are making an application?

"MR. GILROY: That the Court sign a non-party witness subpoena so that at least this problem of the witness answering while wearing one hat and claiming to have no knowledge as to what is stored under the other four hats that he wears, at least we can get around that problem.

"THE COURT: I think that's a very unique position, it's very, I think its a very astute position to take, very bright, very good. Are you from Philadelphia?" (Exhibit 6, pp. 11 - 12). [Omitted from this Appendix.]

20. Counsel for plaintiff prepared a subpoena and a subpoena duces tecum requiring Petitioner's personal appearance in the courthouse on November 4, 1991; and Respondent "so-ordered" both subpoenas, ex parte.

21. Counsel for plaintiff purported to serve both subpoenas on Petitioner, when Petitioner appeared for his continued examination on behalf of the defendant corporation on No-

vember 1, 1991. Copies of the subpoenas are attached hereto as Exhibits 7 and 8. [Omitted from this Appendix.]

22. Petitioner appeared on November 4, 1992 at the time and place stated in the subpoenas. The undersigned appeared as Petitioner's attorney. (A copy of the November 4, 1991 transcript is attached hereto as Exhibit 9.) [Omitted from this Appendix.]

23. At the deposition, the undersigned, as Petitioner's attorney, advised plaintiff that Petitioner was determined to

> ". . . plead the Fifth Amendment to the United States Constitution and the equivalent provisions of the New York State Constitutions, exercise his right [against] self-incrimination, and respectfully decline to answer questions here today." (Exhibit 9, pp. **.) [Omitted from this Appendix.]

24. Plaintiff took no issue with the right of Petitioner, appearing personally as a non-party witness pursuant to subpoena, to assert the protection of the constitutional privileges against self-incrimination. As an officer of a corporation which stands accused of

causing grievous personal injuries due to wrongdoing in ownership or control of commercial real property located in the City of New York, Petitioner is clearly exposed to possible criminal prosecution for the occurences complained of by plaintiff. People v. DiLorenzo, 150 Misc.2d 187, 594 N.Y.S.2d 893 (Crim. Ct., Bx. Co., 1991) (New York City Administrative Code violations); see also, Penal Law, §120.00 (2) and (3); Labor Law, §213; and CPLR §4501.

25. Petitioner continued to assert his personal privileges against self-incrimination, until plaintiff's counsel concluded,

> "MR. GILROY: At this time, I have no further questions, subject to seeking a ruling from the court on the issue of privilege. Does anyone else have any questions of the witness?" (Exhibit 9, p. 11.) [Omitted from this Appendix.]

There being no further questions, Petitioner was permitted to depart the premises, without any application being made for any ruling or instruction by the Court while Petitioner was present.

26. At no time during Petitioner's deposition in his individual capacity on November 4, 1991, and at no time thereafter, did plaintiff or any other party seek any ruling concerning the issues of privilege raised by Petitioner. At no time was Petitioner judicially instructed to answer any of the objected-to questions.

27. At no time was any notice, much less proper and sufficient notice, given to Petitioner of the commencement of any proceeding, or of the making of any motion, for relief directly against Petitioner with respect to his personal deposition. (Cf., Exhibit 9, p. 12.) [Omitted from this Appendix.]

28. The Order complained of (Exhibit 1) was made on notice only to the parties in the Lynn action. Plaintiff's moving papers did not request any relief against Petitioner; nor did plaintiff argue during his motion against the availability to Petitioner, at his personal deposition, of the privilege against self-

incrimination.

29. By reason of the occurences and omissions related above, any obligations, which may have been imposed on Petitioner if the subpoenas had been validly served, were discharged; and all jurisdiction over Petitioner's person, which may have been conferred if the subpoenas were validly served, was exhausted or released.

30. Despite the lack of any continuing or subsequent process or proceeding bringing Petitioner within the Respondent's jurisdiction, the lack of any prior notice to Petitioner or opportunity to defend himself, and the lack of any legal basis for punishing Petitioner, in derogation of the Petitioner's constitutional due process rights and constitutional privileges against self-incrimination, and without any coherent explanation, Respondent, again acting sua sponte, has ordered a $5,000.00 fine against Petitioner, personally, by the Order complained of, Exhibit 1.

31. In addition to the clear threat to Petitioner's rights, liberties and property posed by Respondent's abuse and excess of his jurisdiction, and by Respondent's pattern of ignoring the legal merits of the matters brought before him, such conduct by a justice of the Supreme Court will inevitably engender disrespect for the judiciary and for the rule of law, if not checked.

32. Petitioner has no other, adequate or complete remedy at law for the relief sought herein. Petitioner has made no prior application in this or any other court for the relief sought herein.

WHEREFORE, Petitioner respectfully prays that a judgment in the nature of prohibition be issued by this Court to Respondent, prohibiting Respondent from taking any further action against the Petitioner, directing Respondent to strike the provisions imposing the $5,000.00 fine against Petitioner from his April 9, 1992 Order, and awarding Petitioner

such other and further relief as to the Court appears just and proper.

Dated: New York, New York
June 26, 1992

WILLIAM T. LIVINGSTON, III
Attorney for Petitioner
277 Broadway (Suite 1606)
New York, New York 10007
(212) 406 - 5250

V E R I F I C A T I O N

State of New York)
County of New York) :ss:

KENNETH A. PERKO, Jr., being duly sworn, deposed and says:

that he is the Petitioner herein, has read the foregoing Petition and knows the contents thereof, that the same is true to his personal knowledge, except as to those matters stated on information and belief, and as to them he believes them to be true.

/s/
KENNETH A. PERKO, JR.

Sworn and subscribed
before me, this day
of June, 1992
/s/
Notary Public